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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

VUTHY SENG,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an inadequate recitation of the *Miranda* rights can be cured by a second proper recitation of those rights to permit a voluntary waiver of a defendant's Fifth Amendment rights?

PARTIES TO THE PROCEEDINGS

All parties to this case are named in the caption. No party to this petition is a non-government corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rules 12, 13, and 14, the petitioner, the Commonwealth of Massachusetts, hereby petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts entered in this case on April 23, 2002.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts ("SJC") reversing the first-degree murder convictions of the respondent, Vuthy Seng ("Seng"), is reported as *Commonwealth* v. *Seng*, 436 Mass. 537, 766 N.E.2d 492 (2002), and is reproduced in the Appendix at App. 1-29. The opinion of the Massachusetts Superior Court denying the motion to suppress is unpublished, and is reproduced in the Appendix at App. 30-42.

JURISDICTION

The judgment of the SJC entered on April 23, 2002. App. 1. No petition for rehearing was filed. The issue presented in this case is one of federal constitutional law and was resolved as such by the state court. This Court has jurisdiction to review the state court judgment by petition for writ of certiorari pursuant to 28 U.S.C. §§1257(a) and 2104.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

STATEMENT OF THE CASE

1. *Procedural History*

In December 1995, a Middlesex County, Massachusetts, grand jury indicted Seng for three counts of first-degree murder, one count of armed assault with intent to murder, two counts of assault and battery, and two counts of possession of a firearm without a license. Prior to trial, beginning on October 20, 1997, a four-day evidentiary hearing was held on Seng's motion to suppress the statements he made to the police. On November 3, 1997, Massachusetts Superior Court Judge R. Malcolm Graham denied the motion to suppress and issued written findings of fact and rulings of law. App. 30-42.

On December 9, 1997, after several weeks of trial, the jury rejected the petitioner's insanity defense and convicted him of three counts of first-degree murder, one count of armed assault with intent to murder, two counts of assault and battery, and one count of possession of a firearm without a license. On the same day, Seng was sentenced to serve three consecutive life terms in prison. The trial judge also sentenced him to 19 to 20 years for his armed assault with intent to murder conviction, to be served from and after his final life sentence, and 4 to 5 years for his firearm possession conviction, to be served from and after his assault with intent to murder conviction. The trial judge dismissed his two assault and battery convictions as lesser included crimes to the murders. Seng filed a timely notice of appeal, and the SJC reversed his convictions on April 23, 2002, based on its conclusion that the petitioner's statements to the police were obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). App. 1-29.

2. *The Facts*

A. *The Crimes*

In November of 1995, Vuthy Seng lived in Lowell, Massachusetts, with his girlfriend, Chhong Yim, her three sons, ages fifteen, twelve and nine, and her thirteen year old daughter, Sathy Men. When Seng's relationship with Chhong Yim soured, she asked him to move out of her apartment. After several failed attempts at reconciliation, Seng entered the apartment in Chhong Yim's absence, and executed her three sons with a hand gun and seriously injured her daughter with a gun shot to her head. App. 3-5.

From her hospital bed, Sathy Men identified Seng as her assailant and her brothers' murderer and recounted his cold blooded attack. The police arrested Seng at a friend's home and brought him to the Lowell police station, where he was booked. He was given his *Miranda* rights first in Khmer and then in English, and made statements to the police. At trial, given the testimony of the eyewitness, Sathy Men, the primary defense was lack of criminal responsibility. The Commonwealth used Seng's statements to combat this defense.

B. *The Motion to Suppress*

In his motion to suppress, Seng claimed that his statements to the police should be suppressed because the *Miranda* warnings he received were inadequate. Specifically, he claimed that the Khmer version, given first, inadequately warned him of his *Miranda* rights, and that the improper warnings could not be cured by the second, correct version of *Miranda* in English, where his comprehension of English was limited. App. 5-6. The judge held an evidentiary hearing and denied the motion. App. 30.

The motion judge found that after Seng was booked at the Lowell police station, and before he was interrogated, Officer Socheath Toun (a Cambodian immigrant whom the Lowell police often used as an interpreter), provided Seng "a less than complete and accurate version of the *Miranda* warning in Khmer," and that the officer also advised Seng of his "full *Miranda* rights in English." It was undisputed that the correct *Miranda* warnings were given last, immediately before his statements. App. 6. Both versions were read to Seng from a standard form of *Miranda* warnings in both Khmer and English. The Khmer version was inaccurate. After receiving his rights, Seng signed the form to indicate his waiver. App. 7. This signed form was introduced in evidence and the officer used that form at the motion hearing to translate into English the rights as they appeared in Khmer on the form. App. 7. The improper rights, as translated, appear in the Appendix at 8-9.

Although Khmer was Seng's native language, the motion judge found as a matter of fact that: he understood English; the officers were able to understand him; he taught other Cambodians how to speak English; and, that throughout the booking and interrogation processes, the police asked Seng numerous questions in English, to which he responded appropriately in English. App. 6, 34-35, 39.[1] Furthermore, the motion judge found that Seng had communicated with the police in English several months before the instant crimes when he was a victim of a home invasion; that when he was interrogated in Khmer by members of the Cambridge jail about certain facts relevant to the instant crimes, he responded as he had when previously

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[1] In addition to the fact that Seng was asked (and he answered) booking questions in English, when he was asked in English if he needed medical attention, he replied in English that he did not. App. 35. Also in English, Seng was advised of his right to use the telephone, and he replied, again in English, that he had no one to call. App. 35.

questioned by the Lowell police, in English; and that the one time that he indicated to the police during booking that he could not understand a word ("alias"), Seng was provided an interpreter. The latter fact, the motion judge found, indicated that Seng was not afraid to indicate incomprehension if it existed and also "that thereafter he had no reason" to believe that a "complaint of incomprehension would be made in vain." App. 6-7, 39. The motion judge concluded that the Commonwealth had met its burden of demonstrating that Seng possessed sufficient fluency to understand and voluntarily waive his *Miranda* rights when advised in English, "despite the fact that [the] reading of the *Miranda* warning" in Khmer "was less than complete and accurate." App. 7, 39.

C. *The SJC's Decision*

The SJC held that the admission of Seng's statements into evidence violated this Court's decision in *Miranda* v. *Arizona*. App. 9. The court held that the Khmer warnings were inadequate in several respects, and were not "cured" by the immediately following recitation of the proper warnings in English. App. 9-13. Despite the petitioner's demonstrated understanding of English, the SJC concluded that the discrepancies between the two sets of warnings would only serve to confuse Seng and render his statements involuntary for purposes of the Fifth Amendment. App. 13-15. In other words, the SJC found that repeating the warnings in English, albeit proper in content, essentially integrated the erroneous Khmer warnings into the English version. App. 15. The SJC determined that the error was not harmless beyond a reasonable doubt where Seng's statements to the police were used by the Commonwealth to "strike at the heart of his insanity defense." App. 15.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE OPPORTUNITY TO ANSWER A QUESTION LEFT OPEN IN *DUCKWORTH* v. *EAGAN.*

In *Duckworth* v. *Eagan*, 492 U.S. 195 (1989), this Court had the opportunity to answer the question presented in this case. The Court did not do so because it ruled for the State on different grounds. Thirteen years later, the question is still unanswered. The time has come to resolve it. In *Duckworth*, the defendant was twice given his *Miranda* rights, but the first version stated that counsel will be appointed "if and when you go to court." *Id.* at 197. The defendant argued that the language of the *Miranda* rights administered to him was defective because it failed to provide a clear and unequivocal warning of the right to appointed counsel before interrogation. *Id.* at 199-200. The United States Court of Appeals for the Seventh Circuit agreed and concluded that the first inadequate warning could not be cured by a second proper warning. *Id.* at 200; 843 F.2d 1554, 1558 (CA7 1988). This Court granted *certiorari,* reversed and found that the first warning was adequate under *Miranda. Duckworth* v. *Eagan*, 492 U.S. at 205. That decision leaves open the question presented in this case.

In answering that question, this case provides the opportunity to announce a far more workable rule than that crafted by the SJC. Because two different sets of warnings, one correct and one incorrect, will always pose a potential threat of confusion, the better rule would be that the suspect is presumed to follow the warning that is later in time (when the suspect did not give his statement in between). This is a relatively simple rule that can easily be applied by the state and federal courts.

II. WHETHER IMPROPER *MIRANDA* WARNINGS CAN BE CURED WITH SUBSEQUENT PROPER WARNINGS IS AN IMPORTANT ISSUE TO LAW ENFORCEMENT.

"*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Nonetheless, mistakes are routinely made and they should be correctable. *See id.* at 441 ("no constitutional rule is immutable"). Effective law enforcement should not have to suffer when, in the absence of bad faith, a suspect is improperly advised of his rights and that error is immediately corrected.

In light of the growing diversity of our multicultural nation, the police should not be punished for attempting to advise a suspect of, although improperly, his *Miranda* rights in his native language. This is especially true where the suspect is bilingual, with a full working knowledge of the English language, understands his rights, and where those rights were properly recited in English, as the motion judge found here. Where there is a complete absence of any coercion or improper tactics by the police, punishing the petitioner with suppression in no way furthers *Miranda*'s twin rationales of trustworthiness and deterrence. See *Oregon* v. *Allstate*, 470 U.S. 298, 308 (1985).

III. THE DECISION BELOW CREATES AN UNNECESSARILY RIGID RULE THAT CONTRADICTS THIS COURT'S *MIRANDA* JURISPRUDENCE.

By finding that an inadequate recitation of the *Miranda* rights cannot be cured by a second proper recitation of those rights, the SJC created an unnecessarily rigid and mechanistic rule. This Court has never insisted that *Miranda* warnings be

given in the exact form described in that decision. In *Miranda* itself, this Court said that "the warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant." *Miranda* v. *Arizona*, 384 U.S. at 476. See *Rhode Island* v. *Innis*, 446 U.S. 291, 297 (1980). Indeed, in *California* v. *Prysock*, 453 U.S. 355, 359 (1981), this Court stated that the rigidity of *Miranda* does not extend to the precise formulation of the warnings given a criminal defendant, and that "no talismanic incantation" is required to satisfy its strictures.

Reviewing courts, therefore, need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably "convey to a suspect his rights as required by *Miranda*." *Id.* at 361. In addition to the creation of a rigid rule, the SJC's decision requires perfection from imperfect players. While ignoring the fact that Seng read, spoke, and understood English, it found a formalistic significance to the errors in the first warning and ignored the fact that the second warning was proper. Furthermore, the cases the SJC relied on (including the dissent in *Prysock*) do not support its holding. Indeed, neither of the Ninth Circuit cases[2] presents this situation. The SJC's insistence that

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[2] The SJC relied on *United States v. Garcia*, 431 F.2d 134 (CA9 1970), where the Ninth Circuit determined that the defendant's confession was involuntary where she received several versions of *Miranda*, but on "no occasion was a warning given fully complying with *Miranda*." *Id.* Here, by contrast, the second recitation of *Miranda* was indisputably correct. App. 6, 35. The SJC also relied on *Commonwealth v. Mendiola*, 976 F.2d 475 (CA9 1992), where the Ninth Circuit held that a confession obtained should be suppressed after the defendant received improper *Miranda* warnings in his native language followed by proper warnings in English. *Id.* at 481-482. However, the defendant in *Mendiola* was borderline retarded (if not actually retarded) and had only a limited understanding of English. *Id.* at 478-479.

the dual warnings could only have been "confusing" is speculative and ignores the totality of the circumstances under which voluntariness determinations are made. See *Colorado* v. *Spring*, 479 U.S. 564, 573 (1987) (whether a suspect has voluntarily waived his *Miranda* rights is determined in view of the totality of the circumstances). It also ignores the motion judge's specific finding that the defendant had spoken up in the past when he did not understand English.

The approach taken by the SJC, which essentially adopts Professor LeFave's proposal, see 2 W.R. LaFave & J.H. Israel, Criminal Procedure § 6.8(c) (2d ed.1999), may have surface appeal. App. 14. That is, a complete second warning will ordinarily suffice to cure a deficient earlier warning, but "if the conflict between the two is such that the suspect would be confused by the discrepancy, then a contrary result is necessary." App. 14 & n.7. In practice, however, the "confusion" exception will swallow the rule and prohibit any cure, which in turn will lead unnecessarily to the suppression of otherwise completely voluntary statements.

A better approach is that the suspect is presumed to have followed the warnings that are later in time. This case demonstrates why the petitioner's proposed rule is easier to apply, and inherently better than the SJC's rule. Indeed, Seng understood the second version of his rights (given in English) and he was not confused. Had he been confused, he would have brought the reason for his confusion to the attention of the police as he had in the past. Because there was no evidence to the contrary, it should be presumed that Seng understood and voluntarily waived his *Miranda* rights. As a result, his statements were properly admitted into evidence.

Here, not only did Seng understand and teach English, but in the past when he did not understand something that was spoken to him in English, he had no problem bringing that to the attention of the police. App. 6, 34-35, 39.

CONCLUSION

For the reasons stated above, the Court should issue a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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July 22, 2002

APPENDIX

436 Mass. 537

Supreme Judicial Court of Massachusetts,
Middlesex.

COMMONWEALTH
v.
Vuthy SENG.
Argued Feb. 7, 2002.
Decided April 23, 2002.

Defendant was convicted in the Superior Court Department, Middlesex County, Thayer Fremont-Smith, J., of first-degree murder, armed assault with intent to murder, and possession of a firearm without a license. Defendant appealed. The Supreme Judicial Court, Cowin, J., held that: (1) *Miranda* warnings in defendant's native language, Khmer, were deficient; (2) as a matter of first impression, accurate rendition of the *Miranda* warnings in English did not cure prior defective warnings in Khmer; (3) examining bank card closely enough to comprehend and record account numbers was an impermissible "investigatory search," rather than an "inventory search"; (4) prosecutor's closing argument that the jury should be insulted by the defendant's evidence of mental health treatment was permissible; and (5) instruction not to infer guilt from the fact that the defendant did not submit to a full psychiatric examination at a hospital was permissible.

Reversed and remanded.

Brownlow M. Speer, Committee for Public Counsel Services, Boston Catherine K. Byrne, Committee for Public Counsel Services & Daniel E. Callahan, Committee for Public Counsel Services, Lowell, with him) for the defendant.

Eric R. Barber-Mingo, Assistant District Attorney (Richard D. Grundy, Special Assistant District Attorney & Melissa Weisgold Johnsen, Special Assistant District Attorney, with him) for the Commonwealth.

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, & CORDY, JJ.

COWIN, J.

The jury rejected the defendant's insanity defense and convicted him on three indictments of murder in the first degree based on theories of deliberate premeditation and extreme atrocity or cruelty. The jury also found the defendant guilty of armed assault with intent to murder, assault and battery,[1] and possession of a firearm without a license. The defendant appeals from his convictions claiming that: (1) the admission of his statements to the police during a custodial interrogation violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution because the recitation to him of the *Miranda* rights was inadequate and because the statements were involuntary in the totality of the circumstances; (2) certain bank records were obtained improperly by exploitation of an inventory search for investigative purposes; (3) the prosecutor's repeated assertions to

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[1] The judge dismissed these two assault and battery convictions as lesser included offenses of the murder convictions, but stayed dismissal pending the outcome of the present appeal.

the jury that the defense had "insulted" them with evidence relating to the defendant's treatment at Bridgewater State Hospital prejudiced the defendant's insanity defense; and (4) the judge erred by instructing the jury against drawing an inference of guilt from any refusal by the defendant to participate in further evaluation of his mental state at Bridgewater State Hospital. We conclude that a faulty recitation to the defendant of his *Miranda* rights in the Khmer language prevented the defendant from executing a valid waiver of these rights, and that a subsequent reading to the defendant of the rights in the English language did not cure the defect sufficiently to permit a voluntary waiver. Accordingly, we reverse the judgments of conviction and order a new trial.[2]

1. *Facts.* We summarize the salient background facts the jury could have found and reserve other details for discussion in conjunction with the specific issues raised. In November, 1995, the defendant lived in Lowell with Chhong Yim, and the victims, Chhong Yim's three sons, ages fifteen, twelve and nine years, and her thirteen year old daughter, Sathy Men. Chhong Yim met the defendant in the early part of 1995, and in August, he moved in with her and her children. After the defendant was living in the apartment, the relationship soured. The defendant was very jealous of Chhong Yim and closely monitored her activities. Chhong Yim was unhappy with the defendant's inability to hold a steady job; his failure to pay his share of the rent (a condition of his moving in with the family); his habit of gambling at casinos;

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[2] The defendant also claims prejudicial error from a police officer's statement of his disbelief of the defendant's responses during a custodial interrogation. Because of our disposition of the issue regarding the motion to suppress, we need not address this contention.

and his lack of a pleasant relationship with Chhong Yim's children. As a result, by October, 1995, she asked the defendant to move out. She said she did not love him, once more wanted to be alone with her children, and was even considering reconciling with her husband. The defendant refused to leave. Chhong Yim repeatedly asked the defendant to leave the apartment, to no avail. He insisted that he loved her and wanted to be with her. This situation apparently precipitated the defendant acting "different" toward the children and speaking to them even less than before.

On November 12, 1995, in the early morning hours, the defendant awoke Chhong Yim to ask what was the most important thing in her life. She replied, "gold, diamonds, money not important to [her]," but that "[her] children very important to [her] ... more than anything in the world." Later that day, Chhong Yim visited friends in Lowell. The defendant unexpectedly arrived at the friends' home shortly thereafter. Chhong Yim told the defendant again that he must move from her apartment, this time insisting on a deadline: by the end of the month. The defendant appeared dismayed and visibly upset by this demand. He told Chhong Yim that he was going to a party, but did not do so. Instead, he went to the apartment next door to Chhong Yim's and telephoned her at her friends' home, begging her to give him another chance. She refused to do so, and, suspicious of the defendant's whereabouts, asked several times where he was. In response, the defendant lied and said that he was at another friend's house.

After the fruitless telephone conversation with Chhong Yim, the defendant returned to Chhong Yim's apartment, where he shot the four children who were home alone. Although the children tried to run away, they were unsuccessful, and each was shot in cold blood at least once. The defendant also stabbed one of the boys three times in the neck with a large knife. Sathy Men,

the girl, fought the defendant and tried to flee a number of times, even after being shot. She finally kicked out a window screen and escaped by jumping out the window (the apartment was on the first floor).

After leaving the three young boys to die in the apartment, the defendant ran from the scene, but remained nearby. The defendant was observed disposing of something in a trash barrel. The police discovered the murder weapon in that barrel the next day.

The three boys succumbed to their wounds in the days following the attack. Sathy Men survived. In the hours following the shootings, she recounted the details of the violence to the police from her hospital bed and identified a photograph of the defendant. The police arrested the defendant at a friend's home and brought him to the Lowell police station, where he was booked. He was given his *Miranda* rights first in Khmer and then in English, and made statements to the police. At trial, given the testimony of the eyewitness, Sathy Men, the primary defense was lack of criminal responsibility. The Commonwealth used the defendant's statements to combat this defense.

2. *Motion to suppress*. The defendant claims that the motion judge erred in refusing to suppress his statements to the police because the *Miranda* warnings were inadequate: they were given to him in both Khmer and in English, and the Khmer version, given first, varied substantially from the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966).[3] See

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[3] The defendant further argues that his statements should be suppressed because they were not voluntary in the totality of the circumstances, see *Commonwealth* v. *Mahnke*, 368 Mass. 662,

Commonwealth v. *Adams*, 389 Mass. 265, 269, 450 N.E.2d 149 (1983).

The motion judge found that after the defendant was booked at the Lowell police station, and before he was interrogated, Officer Socheath Toun (a Cambodian immigrant whom the Lowell police often used as an interpreter), provided the defendant "a less than complete and accurate version of the *Miranda* warning in Khmer," and that the officer also advised the defendant of his "full *Miranda* rights in English." Although the judge made no finding as to the sequence of the warnings, the specific defects in the Khmer version, or that Khmer was the defendant's native language, there is no dispute that the warnings in Khmer preceded the English version, or that the defendant's native language was Khmer. As to the defects in the Khmer version of the warnings, the Commonwealth provides nothing in the record to contest Officer Toun's interpretation of the Khmer version. Thus, we accept his interpretation.

In regard to the defendant's understanding of English, the judge found that during the interview with the police, the defendant said that he understood English; the officers were able to understand him; and that throughout the booking and interrogation processes, the police asked the defendant numerous questions in English, to which he responded appropriately in English. Further, the judge found that the defendant had communicated with the police in English several months before the instant crimes when the defendant was a victim of a home

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680, 335 N.E.2d 660 (1975), cert. denied, 425 U.S. 959 (1976). Because we conclude that his statements must be suppressed because the warnings given were inadequate, we do not reach this issue.

invasion; that when he was interrogated in Khmer by members of the Cambridge jail about certain facts relevant to the instant crimes, he responded as he had when previously questioned by the Lowell police in English; and that the one time that the defendant indicated to the police that he could not understand a word (apparently at the booking that preceded the interrogation), the defendant was provided an interpreter. The latter fact, the judge found, indicated that the defendant was not afraid to indicate incomprehension if it existed and also "that thereafter he had no reason" to believe that a "complaint of incomprehension would be made in vain." The judge concluded that the Commonwealth had met its burden of demonstrating that the defendant possessed sufficient fluency to understand and voluntarily waive his *Miranda* rights when advised in English, "despite the fact that [the] reading of the *Miranda* warning" in Khmer "was less than complete and accurate."

We have examined the record of the motion to suppress to discern the specific deficiencies in the Khmer warnings. Officer Toun, who advised the defendant of his rights in both languages, testified at the motion hearing that at the police station he had read the defendant a standard form *Miranda* warning sheet that includes the warnings in both English and Khmer. The defendant signed the form to indicate that he understood what had been read to him. This signed form was introduced in evidence and the officer used that form to "translat[e] into English [the rights] as they appeared [in Khmer] on that sheet" (i.e., the officer translated the rights as they appeared on the form in Khmer into English at the motion hearing):[4]

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[4] Defense counsel objected to Officer Toun's translating the form because Toun was not qualified as a court interpreter. It is regrettable that the Commonwealth did not present a certified court interpreter to interpret the Khmer on this key issue.

"Number one stated, before they ask any questions, you must understand clearly before you answer them . . . .

"Number two. If you don't understand these rights clearly, then you should not be answered at all . . . .

"Number three. Whatever you say, words must be truthful. If not truthful, then it must be--must not be spoken . . . .

"Number four. You have the right to get a lawyer to help you and advise you during questioning.

"Before you — before they ask you any questions, you should have your attorney with you while answering any questions . . . .

"Number five. Whenever you don't have any money to hire a lawyer, one will--it states here, they can help find one for you . . . .

"Number six. Whenever you decided [sic] to answer any questions on your own without the lawyer present, some of the questions that you don't understand you have the right to stop at any time until you speak to a lawyer . . . .

"Number seven. Do you understand all these rights listed above . . . .

"Number eight. If you understood all these, do you wish to speak."

On review of a motion to suppress, we do not disturb the judge's findings of fact unless they are clearly erroneous and we give deference to the judge's legal conclusions, but independently review the correctness of the judge's application of constitutional principles to the facts found. See *Commonwealth* v. *Mello*, 420 Mass. 375, 381 n. 8, 649 N.E.2d 1106 (1995). "Whether [the defendant] was given adequate *Miranda* warnings is a question of law that is reviewed de novo by the appellate court." *United States* v. *Connell*, 869 F.2d 1349, 1351 (9th Cir.1989).

The defendant contends that admission of his statements in evidence violated the dictates of *Miranda* v. *Arizona*, *supra*, and was clear error. We agree. In *Miranda*, the United States Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. In delineating these procedural safeguards the Court stated that "the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed" (emphasis supplied). *Id.* "The defendant may waive these rights, provided that the waiver is made voluntarily, knowingly, and intelligently but 'unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.'" *Commonwealth* v. *Adams*, 389 Mass. 265, 268, 450 N.E.2d 149 (1983), quoting *Miranda* v. *Arizona*, *supra* at 479. "[W]hat *Miranda* requires 'is meaningful advice to the unlettered and

unlearned in language which [they] can comprehend and on which [they] can knowingly act.' *Coyote* v. *United States*, 380 F.2d 305, 308 (10th Cir.), cert. denied, 389 U.S. 992 (1967); see also [*California* v. *Prysock*, 453 U.S. 355, 364 n. 3 (1981)] (Stevens, J., dissenting) (quoting *Coyote*)." *United States* v. *Connell, supra* at 1351.

In this case, the Commonwealth did not meet its " 'heavy' burden," *Commonwealth* v. *Boncore*, 412 Mass. 1013, 1015, 593 N.E.2d 227 (1992), of demonstrating that the defendant was advised of his rights in a meaningful way that he could comprehend. The Khmer version of the rights was deficient in several key respects. The defendant was not advised of his right to remain silent. Indeed, several of the warnings implied the opposite. Warning number three advised: "[w]hatever you say, words must be truthful," and warnings number one, two, and six suggested that the defendant should not answer questions only if he did not understand them.

The defendant was never advised in Khmer that anything he said could be used against him in court. As we have stated: " 'The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court' (emphasis added). *Miranda* [v. *Arizona*], *supra* at 469. This warning 'is an absolute prerequisite to interrogation.' *Id.* at 471. The Court explained that: 'This warning is needed in order to make [the accused] aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege.' *Id.* at 469. Our cases have recognized the mandatory nature of this warning." *Commonwealth* v. *Adams*, *supra* at 269, 450 N.E.2d 149.

The final defect in the Khmer warnings was the failure to state that a lawyer would be appointed if the defendant could not afford one. Warning number four stated only that if you don't have money for a lawyer, "they can help find one for you,"[5] although warnings number four and six did advise that the defendant had a right to have a lawyer during questioning. In *Commonwealth* v. *Colby*, 422 Mass. 414, 418, 663 N.E.2d 808 (1996), we assumed that a similar statement to the defendant ("if he could not afford an attorney, the Commonwealth would attempt to provide one for him") was a "departure from the standard *Miranda* language."

The above provides ample foundation for the motion judge's conclusion that the *Miranda* warnings provided in Khmer were "less than complete and accurate." We have not previously considered whether *Miranda* warnings, given incorrectly in one's native language, are then "cured" by an accurate rendition of the warnings in English. However, we have considered somewhat similar situations in which both correct and incorrect statements of the warnings were provided in English. In *Commonwealth* v. *Dustin*, 373 Mass. 612, 613-615, 368 N.E.2d 1388 (1977), cert. denied, 435 U.S. 943 (1978), the defendant had been given the *Miranda* warnings twice one evening, indicated that he understood them and did not want to make a statement. He also consulted with two attorneys, both of whom advised him not to talk to the police. On the following day, while still in custody, the defendant asked an officer at the jail: "'If I tell you something

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[5] One could speculate that Officer Toun may have recognized this deficiency when, in reading warning number five, he stated: "Whenever you don't have any money to hire a lawyer, one will — it states here, they can help find one for you" (emphasis supplied).

about the incident, will I be admitting my guilt?' The officer replied, 'You are not on the stand and you are not under oath. You can tell me anything you want to.'" *Id.* at 613, 368 N.E.2d 1388. We said that the officer's response "carried an implication that [the defendant's statement] could not be [used against him]. This was directly contrary to the required *Miranda* warning that anything the defendant said could and would be used against him in court." *Id.* at 615, 368 N.E.2d 1388. We concluded that two proper recitations of *Miranda* warnings did not immunize a statement obtained after the police had advised the defendant "directly contrary" to a required portion of the warning and affirmed the motion judge's suppression of the defendant's statement made after the faulty advisement. *Id.* at 614-616, 368 N.E.2d 1388.

In *Commonwealth* v. *Coplin*, 34 Mass. App. Ct. 478, 612 N.E.2d 1188 (1993), the defendant was provided complete *Miranda* warnings while he was lying on the floor handcuffed. An officer testified that it was his "impression" that the defendant "appeared to understand" what he had been told. *Id.* at 480, 612 N.E.2d 1188. At the station, the *Miranda* warnings were given to the defendant both orally and in writing but did not contain the warning that anything the defendant said could be used against him in court. The Appeals Court concluded that, in these circumstances (no proof beyond a reasonable doubt that the defendant understood and voluntarily waived his rights when he was lying on the floor), the Commonwealth had not met its heavy burden of proving waiver. The complete set of warnings given at the time of arrest did not carry over to the events relatively soon after at the police station.[6] *Id.* at 481-483, 612 N.E.2d 1188.

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[6] By comparison, where we assumed without deciding that the defendant received incomplete *Miranda* warnings (omitting

The case of *Commonwealth* v. *Mendiola*, 976 F.2d 475 (9th Cir.1992), involving facts quite similar to those at bar, is instructive. The defendant was given "local statutory rights [which differed from *Miranda*] as well as *Miranda* rights in both English and Chamorro, his native language." *Id.* at 478, 481. The local statutory rights preceded the *Miranda* warnings and, inter alia, informed the defendant "that a lawyer or other person would be contacted if such contact could be effected at no cost to the government or if he could pay for the call in advance." *Id.* at 482. Then the defendant received his *Miranda* rights. *Id.* The court stated: "[T]he warnings were equivocal, contradicting, and open to misinterpretation. [The defendant's] ability to draw the inference that he was entitled to appointed counsel before and during questioning was made more tenuous by the initial statement that a lawyer or other person would not be contacted unless it could be accomplished at no cost to the government. Because of this initial statement, it was not clear whether appointed counsel would be provided before questioning or at some future date." *Id.* at 482-483.

We conclude that where two sets of warnings are given and one is defective or incomplete and the circumstances are such that the defendant would be confused by the discrepancy or omission, a waiver so obtained is not voluntary. See *United States* v. *Garcia*, 431 F.2d 134 (9th Cir.1970) (conviction

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the fact that anything he said could be used against him in court), this defect was cured by two complete correct recitations and by the fact that the defendant signed a card containing the complete warnings before he made any statement. Further, the defendant had exercised his right to remain silent after the first inadequate warning. See *Commonwealth* v. *Scott*, 430 Mass. 351, 354, 718 N.E.2d 1248 (1999).

reversed because defendant given several different versions of "*Miranda* bundle of warnings," none completely correct; warnings, "[t]aken together . . . were inconsistent," and thus, inadequate). See also 2 W.R. LaFave & J.H. Israel, Criminal Procedure § 6.8(c) (2d ed.1999).[7]

Here, the reading of the rights in English was preceded by Officer Toun telling the defendant, "I'm going to read it to you in English now . . . . I'm going to read in English . . . ."[8]

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[7] "What if both oral and written warnings were given but one version was defective or incomplete? Courts have held that if either the written warnings or the oral warnings were deficient in some respect, it suffices that the other set of warnings was complete and correct. This may be a sensible result when the difference between the two sets of warnings is merely that something was omitted from one of them. But if the conflict between the two is such that the suspect would be confused by the discrepancy, then a contrary result is necessary " (emphasis supplied). 2 W.R. LaFave & J.H. Israel, Criminal Procedure §6.8(c) (2d ed.1999).

[8] DEFENSE COUNSEL: "Did you tell him, 'I'm going to read it to you in English now?'"

WITNESS: "Yes, I did."

DEFENSE COUNSEL: "Basically you told him that what you just read him in Khmer you're now going to read in English."

WITNESS: "I'm going to read in English, correct."

DEFENSE COUNSEL: "So, he's already heard — what you

Characterizing the reading of the rights in English (not the defendant's native language) as essentially a repetition of what had just been stated in Khmer could only have had the impact of reinforcing the erroneous warnings. It essentially integrated the erroneous Khmer warnings into the English version. The omission of key warnings from the Khmer version that were then included in the English version, particularly when Khmer was the defendant's native language, and the officer's indication that he was going to repeat in English what had already been said in Khmer, could only have been confusing. The Commonwealth has failed to meet its burden of proving that there was a voluntary, knowing and intelligent waiver of the right to remain silent. Cf. *Commonwealth* v. *Mandeville*, 386 Mass. 393, 403-404, 436 N.E.2d 912 (1982).

It cannot be said that this error was harmless beyond a reasonable doubt. See *Commonwealth* v. *Hosey*, 368 Mass. 571, 579, 334 N.E.2d 44 (1975). The statements that the defendant made after receiving the defective warnings were used by the Commonwealth to strike at the heart of his insanity defense. The Commonwealth's expert witness, a psychiatrist, opined that these statements by the defendant made to the police just after the crimes indicated the absence of a "significant mental disease or defect at that time" and "a very high level of mental cognitive functioning [by] somebody that is able to process information,

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told him in English, he'd already heard in Khmer."

WITNESS: "Right."

DEFENSE COUNSEL: "And you told him that."

WITNESS: "Yes, sir."

manipulate information, and has full capacity of [his] mental facilities." The Commonwealth also used these statements of the defendant in closing argument to argue to the jury that the defendant was "a person who [was] thinking . . . a person who [was] reacting . . . a person who [knew] exactly what he did." The defendant, therefore, must be afforded a new trial. We address only the remaining issues likely to arise at retrial.

3. *Bank records.* The defendant contends that bank records were illegally obtained by "exploitation" of an inventory search of his belongings at the police station, i.e., that the inventory search was used for investigatory purposes, and that the bank records were used to defeat the defendant's insanity defense. During trial, an officer testified that, on the night of the defendant's arrest, a bank card was taken from the defendant's wallet. The bank card contained the name of the Shawmut Bank and its logo on the front,[9] with checking and savings account numbers handwritten in appropriate spaces on the back. We have examined the card. It is not the type of bank card that may be used to obtain money from an automatic teller machine or with which one could make purchases.

Prior to trial, the Commonwealth summonsed the bank's keeper of records for the "records or account information" of the defendant for the two account numbers listed on the back of the bank card in question, as well as any other accounts in his name. Defense counsel moved orally to suppress the card;[10] it was not

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[9] Also on the front of the card was some printed information and handwritten notations not relevant here.

[10] No issue is raised in this court regarding the timeliness of the motion or of any discovery on this issue.

admitted at that time. Defense counsel subsequently filed a written motion to suppress "all evidence obtained pursuant to a warrantless search of the defendant's wallet, as well as the fruits of that search [because] it went beyond a mere search incident to arrest, and instead amounted to a full investigation of the contents of the wallet." Defense counsel submitted an accompanying memorandum that argued that this warrantless search exceeded the permissible scope of a search in the circumstances because it examined items within the wallet and used them to obtain further information.

A hearing was held on the motion. The prosecutor argued that during an inventory search the police found the bank card with information on it that the defendant has an account at a particular bank.[11] Defense counsel maintained that this warrantless search violated the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights. The judge concluded, pursuant to the holding in *Commonwealth* v. *Sullo*, 26 Mass. App. Ct. 766, 532 N.E.2d 1219 (1989), that the police could note "the limited information that is on the card [that] is clear and obvious." Defense counsel objected to the judge's ruling.

The defendant now argues that the search was improper because there was no showing that (1) the inventory was conducted according to standard police procedures as required by the Fourth Amendment to the United States Constitution, see *Florida* v. *Wells*, 495 U.S. 1, 4-5 (1990); *Colorado* v. *Bertine*,

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[11] He also argued that the information would inevitably have been discovered because the defendant's former wife had informed the Commonwealth that she had a bank account with the defendant during the same time period.

479 U.S. 367, 374 (1987), or that any procedures that were followed were written, as required by art. 14, see *Commonwealth* v. *Bishop*, 402 Mass. 449, 451, 523 N.E.2d 779 (1988), or that the search of the wallet was within the scope of any written procedures, *id.*; (2) the examination of the back of the bank card was not within the proper limits of a search for custodial purposes, *Commonwealth* v. *Sullo*, *supra* at 769, 532 N.E.2d 1219; and (3) the police here were not simply inventorying the contents of the wallet, but using the search for investigatory purposes. Such a search for evidence requires a showing of probable cause and exigent circumstances if no warrant is obtained. *Id.* at 772, 532 N.E.2d 1219.

The defendant did not raise below his first grounds of objection (those relating to whether the inventory was conducted pursuant to written police procedures or whether the search exceeded the scope of such procedures). "A defendant 'is not permitted to raise an issue before the trial court on a specific ground, and then to present that issue to this court on a different ground.'" *Commonwealth* v. *Clark*, 378 Mass. 392, 397, 393 N.E.2d 296 (1979), quoting *Commonwealth* v. *Flynn*, 362 Mass. 455, 472, 287 N.E.2d 420 (1972). This waiver doctrine is inapplicable where an error below would create a substantial risk of a miscarriage of justice. See *Commonwealth* v. *Clark*, *supra*. See also *Commonwealth* v. *Johnson*, 46 Mass. App. Ct. 398, 400, 706 N.E.2d 716 (1999). Because of our resolution of the remaining issues concerning the motion to suppress, we need not address these issues regarding the inventory procedure.

We discuss together the second and third issues raised by the defendant and start with the familiar proposition that "[s]earches and seizures conducted outside the scope of valid warrants are presumed to be unreasonable. In such circumstances, the burden is on the Commonwealth to show that

the search or seizure falls within a narrow class of permissible exceptions." *Commonwealth* v. *Rodriguez*, 378 Mass. 296, 391 N.E.2d 889 (1979), citing *Commonwealth* v. *Antobenedetto*, 366 Mass. 51, 57, 315 N.E.2d 530 (1974). See *Chimel* v. *California*, 395 U.S. 752, 762 (1969). The exception applicable here is the inventory search. It is clear that, before a person is placed in a cell, the police, without a warrant, but pursuant to standard written procedures, may inventory and retain in custody all items on the person, including even those within a container, such as a wallet, see *Commonwealth* v. *Bishop, supra* at 451, 523 N.E.2d 779; *Commonwealth* v. *Wilson*, 389 Mass. 115, 117, 448 N.E.2d 1130 (1983). Such searches are justified to safeguard the defendant's property, protect the police against later claims of theft or lost property, and keep weapons and contraband from the prison population. See *id.* at 117 & n. 2, 448 N.E.2d 1130. Such inventory searches are intended to be "noninvestigatory." See *Commonwealth* v. *Alvarado*, 420 Mass. 542, 553, 651 N.E.2d 824 (1995). In this case, it is necessary to determine precisely what "noninvestigatory" means to determine whether the police properly could read the information on the bank card.

In *Commonwealth* v. *Sullo*, 26 Mass. App. Ct. 766, 532 N.E.2d 1219 (1989), the Appeals Court, faced with a similar situation, carefully examined the extent to which our State and Federal Constitutions permit the Commonwealth to use material discovered in an inventory search. The court concluded that the evidence seized from a defendant's wallet in that case (writings on business cards and papers that a witness testified he recognized as a "cuff list" for a gambling operation) should have been suppressed because it was the result of an unlawful investigatory search, i.e., a search for evidence, rather than a lawful inventory search. *Id.* at 772, 532 N.E.2d 1219. The *Sullo* opinion distinguished between such evidence and evidence that is obvious on its face: "We can even assume arguendo that the

police are not required to blind themselves to information appearing on a paper or card that declares its nature to anyone at sight, such as a driver's license or credit card." *Id.* at 770, 532 N.E.2d 1219.[12]

As the Appeals Court recognized in the *Sullo* case, enforcement of the Fourth Amendment and art. 14 requires a distinction between an inventory search and an investigatory search. If, during an inventory search, a police officer views material that is obvious, such as the writing on the card here that indicates that it is issued by Shawmut Bank, it is not realistic to expect the officer to forget what he has seen; and no purpose is served by requiring him to do so.[13] The officer therefore may utilize the information so acquired. There is a substantial difference, however, between observing the "Shawmut Bank" lettering and logo on the front of the card and examining the card closely enough to comprehend (and record) the multi-digit account numbers that were written on the back of the card. In this case, no valid inventory purpose would be served by recording the detailed information. It may be, however, that in some situations, recording the numbers on a card in a wallet may serve

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[12] We read this sentence to mean that the police need not "blind themselves" to obvious facts that identify an item as a driver's license or a credit card. That the sentence was not intended to mean that the police may take note of all the data on those documents is apparent from a complete reading of *Commonwealth* v. *Sullo*, 26 Mass. App. Ct. 766, 532 N.E.2d 1219 (1989).

[13] This situation may be analogized in some respects to the plain view doctrine. See *Commonwealth* v. *Balicki*, 436 Mass. 1, 8, 762 N.E.2d 290 (2002).

a valid inventory purpose. For example, there may be legitimate reasons (such as protecting the police against claims of theft or misuse) to record in an inventory search the identifying numbers of cards that can be used to obtain items of value, such as credit cards, charge cards or cash cards.

Distinguishing between inventory and investigatory searches in this manner is not peculiar to Massachusetts: see, e.g., *Waine* v. *State*, 37 Md. App. 222, 234, 377 A.2d 509 (1977) (officers exceeded scope of reasonable inventory search by reading papers in defendant's personal effects); *State* v. *Rodewald*, 376 N.W.2d 416, 421-422 (Minn.1985) (suggesting that illegality, if any, in reading cards in wallet might have justified suppression of cards and their contents, if State wanted to use them as evidence); *State* v. *Mordeszewski*, 68 Wis.2d 649, 659, 229 N.W.2d 642 (1975) (where officer validly searching defendant's wallet to sort papers and check for razor blades testified that headline of newspaper clipping about recent rape merely "caught his eye," "it would be unreasonable to say he could not legally notice what he was seeing in open view"). See also *D'Antorio* v. *State*, 926 P.2d 1158, 1165 (Alaska 1996) (detailed reading of papers found in inventory search of defendant's car violates reasonable expectation of privacy and cannot be sustained under inventory exception, but reading and listing names and numbers on credit cards seized during inventory was reasonable to protect property and to protect police against claims of lost or stolen property, and "this information declares itself on sight" to inventory officer).

The United States Supreme Court has also struggled with this issue. See *South Dakota* v. *Opperman*, 428 U.S. 364 (1976) (five-to-four decision), and especially the oft-quoted language of Justice Powell *id.* at 380 n. 7 (Powell, J., concurring): "As part of their inventory search the police may discover materials such

as letters or checkbooks that 'touch upon intimate areas of an individual's personal affairs,' and 'reveal much about a person's activities, associations, and beliefs.' . . . In this case the police found, inter alia, 'miscellaneous papers,' a checkbook, an installment loan book, and a social security status card . . . . There is, however, no evidence in the record that in carrying out their established inventory duties the[ ] police do other than search for and remove for storage such property without examining its contents." (Citations omitted.) One commentator has stated that the *Opperman* case "quite conclusively indicates that a majority of the Court would not approve of such a practice [examination of personal papers] as part of the routine vehicle inventory process." 3 LaFave, Searches & Seizures, § 7.4(a), at 560 (3d ed.1996). More recently, the United States Supreme Court has stated: "The individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime.'" *Florida* v. *Wells*, 495 U.S. 1, 4 (1990), quoting *Colorado* v. *Bertine*, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring).

Finally, the American Law Institute Model Code of Pre-Arraignment Procedure 530 (1975), provides: "Generally speaking, none of [the legitimate purposes of a custodial search] will justify reading the accused's papers, except for the limited purposes specified in subsection (2) [of Section SS 230.6]." Subsection 2 of Section SS 230.6 states in part: "Documents or other records may be read or otherwise examined only to the extent necessary for such [custodial] purposes, including identity checking and ensuring the arrestee's physical well-being." *Id.* at 146. See *Commonwealth* v. *Sullo, supra* at 769, 532 N.E.2d 1219.

Applying the principles distinguishing an inventory from an investigative search to the facts before us, the information on the front of the bank card, that it is a Shawmut bank card, declares its nature to anyone at sight. The account numbers written on the back of the card are not as obvious and would not be recalled simply from a permissible inventory viewing. "What the police may not do is hunt for information by sifting and reading materials taken from an arrestee which do not so declare themselves." *Id.* at 770, 532 N.E.2d 1219. Nor would there be any need for the police to record the account numbers on an inventory list, given that this particular card was of no value. Contrast *D'Antorio* v. *State, supra.*[14] Recording this information would not serve any of the generally accepted objectives of an inventory search preceding incarceration.

The information on the back of the card was not overtly incriminating. It most likely became useful as an investigative tool at a later point during the investigation.[15] As the Appeals Court concluded in *Commonwealth* v. *Sullo, supra* at 772, 532 N.E.2d 1219: "In making an inventory . . . the police are to act more or less mechanically, according to a set routine, for to allow

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[14] We do not decide today whether writing or numbers on any other types of cards may be permissibly recorded during an inventory search. That is a question dependent on the facts of each case.

[15] It does not appear that the relevance of the defendant's gambling habits was clear at the time the inventory search was conducted. Although it does not affect our decision, we assume that this matter developed importance as the police became aware that the defendant's gambling was a source of friction between him and Chhong Yim.

then a range of discretion in going about a warrantless search would be to invite conduct which by design or otherwise would subvert constitutional requirements." The police need not "blind themselves" to information visible during an inventory search; what they may not do is investigate the information in the wallet without obtaining a search warrant.[16]

Accordingly, here, it would have been improper for the police to read and record the information on the back of the bank card. It may well be that a permissible reading of the name of the bank would have enabled the Commonwealth to obtain the records, but to the extent discernible from this record, it appears that access to the bank account data resulted from an impermissible investigatory search of the handwritten numbers on the back of the card. The Commonwealth, having been alerted to the constitutional issue here (by oral and written motions), failed to present any evidence to carry its burden to establish that this was a lawful inventory search. See *Commonwealth* v. *Sullo*, supra at 772, 532 N.E.2d 1219. The argument that occurred before the judge does not substitute for the evidence on which a

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[16] Our decision does not mean that police may never obtain or record additional information, such as the numbers on the back of the defendant's bank card. We require only that they secure a warrant before doing so. Once the police become aware that the material may be of evidentiary value (here, because of the relevance of the defendant's gambling), they will likely have the probable cause necessary for a warrant. However, the inventory search exception will be strictly limited to the purposes underlying that exception.

judge could rest adequate findings.[17] The bank records are to be excluded from any retrial. See *Commonwealth* v. *Rodriguez*, supra, 302-304.[18]

4. *Closing argument.* The defendant also claims that the prosecutor impermissibly argued in closing that the defense had "insulted" the jury by evidence regarding the defendant's treatment at Bridgewater State Hospital (hospital). The defendant cites three passages to this effect.[19] Defense counsel objected

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[17] The prosecutor also argued that the records would inevitably have been discovered, see note 11, supra. Again, no evidence was introduced at the hearing to support this theory on which the judge, or this court, could ground a ruling.

[18] Because of our resolution of this issue, we make no comment regarding whether the defendant's person and the effects previously taken from him during booking remain "fair game" for a warrantless ("second" or closer look) search during the period of his incarceration. See *United States* v. *Edwards*, 415 U.S. 800 (1974).

[19] The prosecutor in closing argument to the jury repeatedly assailed the defense follows:

> "[L]et me just say how much the defense asks you to look at the Bridgewater State Hospital records developed by this defendant close to two years after the fact to try and explain away the shooting deaths of [the victims], and be insulted because you should be . . . .
>
> "And to draw your attention to matters after the fact, after a human being has been charged and it

immediately after the argument and asked for an instruction regarding the improper argument. "The prosecutor is entitled to argue the evidence and fair inferences to be drawn therefrom," *Commonwealth* v. *Paradise*, 405 Mass. 141, 152, 539 N.E.2d 1006 (1989), but may not appeal to the emotions of the jury. *Commonwealth* v. *Gordon*, 422 Mass. 816, 830-831, 666 N.E.2d 122 (1996). There is a distinction between a dramatic description in an argument and an argument designed to appeal to the jury's emotions. The former is properly used as an aid to the jury in evaluating the merits of a proposition the Commonwealth places before the jury. Comments that appeal to emotions are ones that have the effect of engendering the jury's anger toward the defendant or his counsel so as to evoke an emotional rather than an intellectual response. The argument here was the prosecutor's attempt to convince the jury that the defendant's insanity defense was not logical, and, while close to the line, considered in context, was not improper. See *Commonwealth* v. *Cohen*, 412 Mass. 375, 388, 589 N.E.2d 289 (1992) ("It is not improper for the prosecutor to suggest to the jury that the defendant attempted to 'fool' them"). See also *Commonwealth* v. *Obershaw*, 435 Mass. 794, 808, 762 N.E.2d 276 (2002) (statement that testimony of defendant was "an insult to the jury" was no more than

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> is very clear that they will stand trial for the murder of three children, that they have developed a depressive [dis]order and therefore are not criminally responsible for those murders is insulting, and nothing less . . . .
>
> "That's what's going on at Bridgewater State Hospital, and you should be insulted that they now come to you, and that's the sum total of their defense."

"rhetorical flourish"). Further, we "assume a 'certain measure of jury sophistication' in sorting out excessive claims." *Commonwealth* v. *Lyons*, 426 Mass. 466, 474, 688 N.E.2d 1350 (1998), quoting *Commonwealth* v. *Kozec*, 399 Mass. 514, 517, 505 N.E.2d 519 (1987).

5. *Instruction.* The final issue that may arise on retrial is that the judge instructed the jury, over the defendant's objection, not to infer guilt from the fact that the defendant did not submit to a full psychiatric examination at the hospital.[20] The defendant claims that this instruction violated his right against self-incrimination under art. 12 of the Massachusetts Declaration

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[20] "As I have told you, any questions by a lawyer are not evidence even though they may imply something, and that goes for the lawyers on either side of the case. Any questions by the prosecution which may have implied that the defendant declined to cooperate in further evaluation of his mental state at the Bridgewater State Hospital are not evidence.

"I'm not saying that there were any such questions, but if there were any evidence in that regard it's not to be considered by you as bearing at all on the guilt or innocence of the defendant. The defendant had a perfect right to decline, if he did, to participate in further evaluation, and no inferences of guilt or lack of criminal responsibility can be drawn from a defendant's failure, if there was one established here, and I am not saying there was any such evidence, to participate in further evaluation.

"If there was evidence of a limited opportunity of the Commonwealth to do further evaluation, to the extent there was such evidence, you may consider that only as it might relate to the issue of the reasons for the medication of the defendant at the Bridgewater State Hospital, that would be the only relevance of that type of information."

of Rights, as construed by *Commonwealth* v. *Zevitas*, 418 Mass. 677, 639 N.E.2d 1076 (1994). The defendant specifically claims that the judge's instruction informed the jury that he had exercised his right not to submit to a full psychiatric examination. The *Zevitas* case involved a prosecution of a vehicular homicide by reckless or negligent operation while under the influence of alcohol. At trial there was no evidence that the defendant had refused a blood alcohol test. But the judge "told the jury, by strong implication at least, that the defendant's blood alcohol level had not been tested, and that the reason no test was conducted was that the defendant refused to submit to such a procedure." *Id.* at 683, 639 N.E.2d 1076. We held that such instructions regarding a defendant's refusal to submit to a breathalyzer test violated the privilege against self-incrimination because that interpretation of the law compelled him to furnish evidence against himself.

Here, the defendant, through his expert witness, attempted to convince the jury that he was taking various medications at Bridgewater because he was mentally ill. On cross-examination, the Commonwealth permissibly required the expert to explain that the hospital personnel decided to medicate the defendant because he would not permit them to conduct a thorough psychiatric examination of him. In such circumstances, where the defendant introduced the subject and made refusal an issue, he may not then assign as error the judge's instructions on the point. Thus, it was not improper for the judge to instruct the jury that they should not use the defendant's lack of participation in a psychiatric examination as bearing on the defendant's guilt or criminal responsibility.[21] Cf. *Commonwealth* v. *Martinez*, 431

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[21] If an instruction were to be given, it should be given at the time of the testimony. It may be repeated during the final instructions.

Mass. 168, 183-184, 726 N.E.2d 913 (2000) (where proper to admit testimony concerning defendant's invocation of right to remain silent, judge should instruct jury as to limited purpose of evidence and that no negative inference should be drawn from defendant's invocation of his rights).

6. *Conclusion.* Because the defendant's statements to the police should have been suppressed, the judgments are reversed, the verdicts set aside, and the cases remanded to the Superior Court for a new trial.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CRIMINAL ACTION
NOS. 95-2257, 2305

COMMONWEALTH

vs.

VUTHY SENG, AKA "THY," "T"

FINDINGS OF FACT, RULING OF LAW, AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND EVIDENCE

Defendant is charged with armed assault with intent to murder, three counts of murder, two counts of assault and battery with a dangerous weapon, possession of a firearm without a license, and unlawful possession of ammunition. On October 21, 23, and 24, 1997, the court conducted a hearing on defendant's motion to suppress statements made to the police, to jail personnel, and to hospital personnel. As grounds for suppression defendant argues that his arrest was unlawful for lack of a warrant, and, alternatively, that both an inadequate *Miranda* warning, and his own physical condition, precluded the necessary volition.

For the reasons which follow, this motion to suppress is **DENIED**.

FINDINGS OF FACT

The Arrest

In November, 1995, defendant was living at 502 Moody Street, apartment 1B, in Lowell, Massachusetts. He resided there with Chhong Yim, her three sons, and her thirteen year old daughter, Sathy Men. Ms. Yim and her children had lived at that address for eight years (since arriving to the United States from Cambodia). She met defendant in the early part of 1995, and he eventually moved in with her and the children.

In the early afternoon of November 12, 1995, Nop Phany, a friend of defendant since 1990, received a call from defendant requesting a ride. Phany borrowed a co-worker's car and drove to Lowell City Hall to pick up defendant and give him a ride home to Moody Street. When he arrived at City Hall, Phany noticed a smell of alcohol on defendant's breath, but noted that he appeared in full control of himself, and did not appear to be under the influence of alcohol. Phany dropped off defendant at 502 Moody Street, and left to return the borrowed car.

At approximately six p.m. defendant entered the living room at 502 Moody Street. Chhong Yim's four children were playing video games there. After speaking briefly with them, defendant left the room. He returned shortly thereafter carrying a handgun. Defendant proceeded to shoot the four children, continuing his attack with a machete. Sathy managed to escape the apartment by climbing out a window. She summoned her aunt who lived next door for help. Her aunt called the police.

Shortly after six p.m. on November 12, 1995, Veasna Mak, a fifteen year old neighbor of defendant, heard the loud noise of sirens in the vicinity of the Yim residence. Accompanied

by his brother, Ratnak, he proceeded out of his apartment at 782 Merrimac Street, into an adjacent alley. In the alley the pair saw defendant standing near some trash barrels. Defendant staggered in their direction. Several times he stumbled to the ground. Each time he picked himself up and continued toward them, often holding onto a fence to steady himself. Veasna and his brother approached defendant, and believing that he was drunk, attempted to persuade him to remain on the ground to avoid injuring himself. On closer inspection, the boys noticed blood in his ear. Veasna ran to the apartment and returned with towels for defendant to use to stop the trickle of blood from his ear.

Ratnak asked defendant if he wanted them to call an ambulance to assist him. Defendant refused the ambulance but told the boys that he wanted to be taken to an address on Hampshire Street in Lowell, "the home of the tattoo master." The boys, and their brother-in-law helped defendant into a car and drove him to 11 Hampshire Street. During the ride to Hampshire Street defendant wretched a couple of times and coughed up what appeared to be a clear mucous.

At Hampshire Street, the boys helped defendant out of the car and to the porch of the building. Defendant told the boys that he was all right and could make it up the stairs by himself. Upon hearing defendant's remarks, the boys returned to their car. They watched as he walked, unaided, up the stairs of the apartment building to the second floor. They then returned home.

At approximately six-thirty p.m. on November 12, 1995, the Lowell Police responded to the call for help made by Sathy's aunt. Upon entering 502 Moody Street the officers observed Sathy. She was bleeding profusely from what appeared to be a gunshot wound to the head. Also on the floor of the apartment were Sathy's three brothers. Each appeared to have been shot, and either stabbed or slashed. A machete and a meat cleaver,

each covered with blood and several spent and live .22 caliber shells, were found at the scene.

The children were rushed by ambulance to the Cambridge City Hospital, where the three male victims subsequently died. At the hospital, Lowell Police Inspector Sullivan, concerned that Sathy might die, interviewed her and obtained a statement as to what had occurred. Upon learning the name of the attacker, the police obtained a photograph of defendant from Ms. Yim and showed it to Sathy. Sathy positively identified defendant as her attacker.

Soon thereafter, Lowell Police Inspector Convoy and Officer Tuon (a Cambodian immigrant whom the Lowell Police often used as an interpreter) were directed to 11 Hampshire Street. Officer Turn proceeded to the rear of the building. Officer Conroy knocked at the porch door. He heard a female adult and children yelling, but no on opened the door. Officer Conroy proceeded to the driveway of the building. While standing in the driveway he saw defendant peering out the second floor window from behind a curtain.

Officer Convoy returned to the porch door, which was now open, and was directed to the second floor. At the top of the stairs, the apartment door was opened by a young boy. Officer Convoy entered the apartment and saw defendant lying on a couch, a blanket pulled to his chin. He observed blood on defendant's ear. After confirming defendant's identity, Officers Convoy and Tuon arrested him. Shortly thereafter Sergeant Durkin and Lieutenant Potvin of he Lowell Police led defendant down the stairs (defendant, however, walked under his own power), placed him in an unmarked cruiser, and transported him to the police station where he was booked.

The following day the police searched the alley where the Maks first saw defendant on November 12, 1995. In one of the trash barrels they discovered a .22 caliber silver handgun which they later determined to be the murder weapon. Upon further investigation they determined that defendant had shot the children in their mother's apartment, ran out the back door of the building, climbed over a stone wall (approximately three feet high with a fence on top of it), and walked up the alley to the spot where the Maks discovered him.

The Booking

Defendant was taken into police custody at approximately nine-thirty p.m., and booked approximately ten minutes later. The unmarked police car used to transport him entered the station through the garage. Defendant was able to exit the vehicle under his own power, and walk, unaided, up a flight of stairs to the booking area. At the booking area, consistent with usual procedure, defendant was handcuffed by one arm to a rail and required to stand for the duration of the booking.

Officer Ramirez was the booking officer on the night of defendant's arrest and he began the process of obtaining information, speaking to defendant in English. However, when Ramirez asked defendant whether or not he had ever used an alias, defendant indicated that he did not understand the meaning of the word "alias." Officer Tuon, also present at the booking, explained the word to defendant in the Khmer language. Officer Tuon then, in English, asked defendant his age, whether and by whom he was employed, his father's full name, his address, and the other remaining questions on the booking form. Defendant answered all of Tuon's questions in English.

As he was obtaining this information, Officer Tuon observed that defendant had bloodstains on his right hands, right

knee, and elbow; dried, caked blood on and behind his right ear; and a trickle of blood coming from that ear. Besides this trickle of blood, Officer Tuon observed no actual injury. He nonetheless asked defendant if he needed medical attention. When defendant said he did not require medical attention, Officer Tuon advised him, again in English of his right to make a telephone call. Defendant replied, in English, that he had no one to call. Through the booking defendant remained standing, unassisted, and answered all of the officer's questions. He appeared alert and oriented, and responded appropriately to the questions asked.

After the booking, defendant was escorted to the interview room. In order to get there, defendant had to walk down a hallway, up two half flights of stairs, and into the room—a distance totaling approximately 100 feet. Defendant walked there, unaided by the accompanying officers, and was met by Inspector Conroy, Sergeant Durkin, and Lieutenant Potvin.

Officer Tuon advised defendant of his full *Miranda* rights in English. He also provided a less than complete and accurate version of the *Miranda* warning in Khmer. Upon waiving his *Miranda* rights, defendant made certain statements against his own interest. During the interview, which lasted approximately two hours, defendant stated that he understood English, and in fact spoke English such that the officers were able to understand him, and to form a belief that he was responding appropriately to their questions. During the interview the officers did observe a stale odor of alcohol on defendant's breath, but concluded that he was not under the influence of alcohol. Moreover, the officers provided defendant with water on several occasions, and permitted him to use the bathroom on more than one occasion.

Approximately half way through the interview, upon drinking some coffee, defendant spit up a small amount of fluid into a trash barrel. The officers observed the fluid to be a

brownish color, consistent in appearance with that of coffee. At no other time during the interview did defendant spit up or vomit.

In the interview room the officers examined the defendant's head for cuts, recalling broken glass in the apartment at 502 Moody Street. They found no cuts or lacerations. They noted the blood on defendant's ear, and defendant stated that he received the injury during a fight with a "Spanish" male who hit him on the head with a stick or pipe. Defendant declined medical attention. Shortly after midnight defendant was brought to his cell.

On November 13, 1995, defendant was taken to the Lowell District Court. While there, defendant was interviewed by the probation department, appointed counsel, arraigned, and thereafter transported to the Cambridge Jail to await trial.

Shortly after four p.m. on November 13, 1995, Lt. Roebuck of the Cambridge Jail noticed defendant in the processing area of the jail. Defendant was lying on a wooden bench on his side with his knees tucked up in a fetal position. The officer assumed that defendant was suffering from illicit drug withdrawal sickness. He summoned the jail nurse, who came to see defendant.

Barbara Sullivan, a registered nurse, examined defendant who was lying on a bench, partially covered by a shawl, and holding his head. Defendant seemed incoherent to her, and likewise concluded that he appeared to be experiencing withdrawal sickness from the use of illegal drugs. She summoned Eng Chhor, a corrections officer who spoke Khmer, to interpret for her. Chhor asked defendant whether he was under the influence of drugs. Defendant responded he was not, and again stated that a Spanish male had struck him with a stick. After seeing the dried blood on defendant's ear, the nurse called

for an ambulance. The ambulance arrived shortly thereafter, and transported defendant to Cambridge City Hospital.

Officer Chhor accompanied defendant o Cambridge City Hospital, riding along in the ambulance. At the hospital, Chhor assisted hospital personnel with the intake process. When defendant was asked what happened to him, he again reported his earlier story about the incident involving the Spanish male. The radiologist, through Chhor, asked defendant whether he had ever been shot, struck by metal, or had head surgery. Defendant responded in the negative. Concerned by what appeared on a CAT scan to be a metal fragment near defendant's ear, the doctor ordered that defendant be transported by ambulance to the Massachusetts General Hospital (MGH).

At MGH, Chhor again acted as an interpreter, assisting the treating physician in obtaining preliminary information about defendant and his injury. Defendant's answers appeared to be appropriately responsive to the questions asked of him. Moreover, defendant once again repeated that a Spanish male had struck him on the head with a stick or a bat.
While at MGH defendant underwent an operation in which gunshot fragments were removed from his right ear canal. There were no entrance wounds on defendant's skull.

RULINGS OF LAW

I. Lawfulness of Defendant's Arrest

Defendant asserts that his warrantless arrest was unlawful. He contends that all statements obtained incident to this arrest are "fruit of the poisonous tree" and , therefore, must be suppressed.

It is well established that "exigent circumstances" justify warrantless arrest. *Commonwealth* v. *Bradshaw*, 385 Mass. 244,

253 (1982). The factors which tend to support a finding of exigency have been clearly identified: (1) a crime of violence, (2) a showing that the suspect was armed, (3) a clear demonstration of probable cause, (4) strong reason to believe the suspect was at home, and (5) a likelihood that the suspect would escape if not apprehended. *Commonwealth* v. *Forde*, 367 Mass. 798, 807 (1975). Moreover, a court has never held that all of these factors must be present to support a finding of exigent circumstances. *Bradshaw, supra*, at 255.

It is unclear whether any of defendant's alleged victims had yet died at the time of his arrest. Nevertheless, minimally, the police suspected defendant of four counts of armed assault with intent to kill when they apprehended him. That is, they suspected him of a violent crime, of being armed. Furthermore, as it was a victim who identified defendant as the assailant, clearly the police effected this arrest with probable cause. Additionally, the police entered to make the arrest only upon seeing defendant peer out a second floor window.

Thus four of the five determinative factors were present at the time of defendant's arrest. Therefore, exigent circumstances existed, and defendant's arrest was lawful.

II. Adequacy of Defendant's *Miranda* Warning

Defendant claims lack of sufficient fluency in English to understand and waive his *Miranda* rights. Therefore, he contends that statements rendered subsequent to this waiver must be suppressed.

"A confession can be voluntary in the legal sense only if the suspect actually understands the import of each *Miranda* warning." *Commonwealth* v. *Garcia*, 397 Mass. 422, 429 (1980). This stated, the Commonwealth bears the burden of

demonstrating that a defendant possesses enough fluency to waive his rights and to respond intelligently to questioning. *Commonwealth* v. *Gil*, 393 Mass. 204, 214 (1984). An important factor for consideration is whether or not a defendant complained of incomprehension. *Commonwealth* v. *Alves*, 35 Mass. App. Ct. 935, 936 (1993) (Rescript Opinion).

The Commonwealth demonstrated that in March of 1995 defendant conversed in English with a police officer concerning a home invasion in which he had been a victim. Additionally, there was evidence that defendant had in the past assisted another Cambodian in learning to speak English more clearly. Furthermore, throughout the booking and interrogation processes, the police asked defendant numerous questions in English, which he answered, appropriately, in English. His apparent comprehension is further corroborated by the fact that when personnel of the Cambridge Jail questioned him in Khmer, he answered as he had when previously questioned by the police in English — i.e., that he had been attacked by a Spanish male. Finally, the significance of the fact that the one time defendant actually complained of incomprehension, he was immediately provided the services of an interpreter, cannot be overlooked. It demonstrates not only that defendant was unafraid to voice incomprehension when it occurred, but also that thereafter he had no reason to believe that a complaint of incomprehension would be made in vain.

Therefore, despite the fact that Officer Tuon's reading of the *Miranda* warning in Khmer was adequately stated, his waiver is still voluntary. The Commonwealth has met its burden of demonstrating that defendant possessed sufficient fluency to have understood and voluntarily waived his rights when advised in English.

III. Effect of Defendant's Physical Condition

Defendant asserts that due to his physical condition, waiver of his *Miranda* rights, and the making of any statements, were involuntary. Specifically, defendant contends that because he had bullet fragments in his head, he was incapable of volition. Alternatively, he contends that intoxication rendered him incapable of volition.

In evaluating volition, courts must determine whether statements were the "product of a rational intellect." *Commonwealth* v. *Callahan*, 401 Mass. 627, 631 (1988). Such determination involves "an assessment of the 'totality of relevant circumstances . . . .'" *Commonwealth* v. *Allen*, 395 Mass. 448, 454-55 (1985) quoting *Commonwealth* v. *Mahnke*, 368 Mass. 662, 680 (1975). "In addition to such factors as whether there was physical or psychological coercion, the judge must consider the defendant's physical and mental condition. Statements that are attributable in large measure to a defendant's debilitated condition, such as insanity, drug abuse or withdrawal symptoms, *intoxication, "or the concussion of a bullet shattering in his head,* are not the product of rational intellect of free will and are involuntary." *Allen, supra*, at 455, quoting *Pea* v. *United States*, 397 F.2d 627, 634 (D.C. Cir 1967) (emphasis added). This is not to say, however, that statements made by a defendant suffering from a bullet wound are involuntary as a matter of law. *Allen, supra*, at 458. Whether statements made by a defendant with a self-inflicted gunshot wound are voluntary can only be determined upon individual assessment. *Id.*

There is no evidence that defendant was intoxicated at the time he waived his *Miranda* rights, or at the time he made any statements. Similarly, there is no evidence that the police sought to exploit knowledge of a debilitated condition, and that their questioning was thus akin to coercion, Although defendant had

dried blood in his right ear, the appearance of this dried blood was not indicative of an emergency medical situation, and certainly not of the fact that defendant had suffered a gunshot wound. Because the police were unaware that defendant has sustained any injury of severity, they cannot credibly be accused of having taken advantage of this injury through their interrogation. Therefore, the remaining applicable inquiry is whether defendant's injury debilitated him to such an extent that his statements must be deemed involuntary.

The medical records introduces at the hearing do not indicate that the fragments in defendant's ear canal interfered with his ability to think rationally. Thus the court must infer from an examination of defendant's actions whether, in fact, the fragments has such an effect.

Throughout the booking and interrogation defendant gave lucid and appropriate responses to the questions asked of him. Moreover, the record indicates that defendant performed similarly in response to questions by Lowell probation officers, and Officer Chhor of the Cambridge Jail. Where a defendant conveys information in a rational manner and states accurate facts, the court may conclude the statements were voluntary despite an injury or illness. See *Commonwealth* v. *Colon*, 408 Mass. 419 (1990) (physical injury or illness of defendant).

The court must also consider whether statements made by defendant to medical personnel are admissible. *Miranda* warnings are not required where defendant answers questions at the behest of medical personnel for the purpose of diagnosis and treatment of his condition. Moreover, the fact that Officer Chhor of Cambridge Jail served as an interpreter, assisting medical personnel in their diagnosis and treatment of defendant, does not necessitate the giving of a *Miranda* warning. Officer Chhor, in eliciting information, was not acting in his capacity as a

corrections officer, but merely as a translator. Furthermore, there is no evidence that jail officials attempted to solicit, through medical personnel, incriminating information from defendant.

Finally, defendant's statements made to medical personnel, through Officer Chhor, were the product of a rational intellect, responsive to the questions asked, and voluntarily made.

ORDER

Therefore, it is **ORDERED** that defendant's motion to suppress statements made is **DENIED**.

/s/ R. Malcolm Graham
R. Malcolm Graham
Justice of the Superior Court

Dated: 11/3/97